

1 **Committee Print**
2 **Committee on Labor and Workforce Development**

3 ~~B23-494~~

4 **AMENDMENT IN THE NATURE OF A SUBSTITUTE**

5 November ~~1930~~, 2020

6
7 Councilmember Elissa Silverman

8
9 A BILL

10
11
12 B23-494
13
14

15
16 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
17
18
19
20

21 To ban non-compete provisions in employment contracts and employer policies, to protect
22 employees from being required to sign non-compete agreements, to make void and
23 unenforceable non-compete provisions entered into after the applicability date of this act,
24 to prohibit an employer from retaliating or threatening to retaliate against an employee
25 for refusing to agree to a non-compete provision, the failure to comply with the
26 employer's non-compete provision or policy, or inquiring about the employee's rights or
27 informing another person or entity about a possible violation of title I of this act, to
28 exempt medical specialists from the law's requirements, to protect medical specialists by
29 requiring their employers to provide 14 days' notice of non-compete provisions and
30 certain informative language, to require that employers inform employees of title I of this
31 act, to require that the Mayor and the Attorney General administer and enforce title I of
32 this act consistent with their respective powers and rights under An Act To provide for
33 the payment and collection of wages in the District of Columbia and the District's
34 Administrative Procedure Act, to authorize the Mayor to collect administrative penalties
35 for violations of title I of this act, to authorize employees to bring administrative
36 complaints and civil actions against employers for violations of title I of the act, to
37 provide statutory penalties for violations of title I of this act; to amend An Act To provide
38 for the payment and collection of wages in the District of Columbia to provide that
39 revenue from administrative penalties recovered under title I of this act shall be deposited
40 into the Wage Theft Prevention Fund and used to enforce the provisions of title I of this
41 act and other employee protection laws; and to repeal the Broadcast Industry Contracting
42 Freedom Act of 2002.

43
44 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
45
46 act may be cited as the "Ban on Non-Compete Agreements Amendment Act of 2020".

TITLE I. BAN ON NON-COMPETE AGREEMENTS

Sec. 101. Definitions.

For the purposes of this title, the term:

(1) “An Act” means An Act To provide for the payment and collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1301 *et seq.*).

(2) “Employee” means any individual who performs work in the District of Columbia on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District of Columbia, except that this term shall not include:

(A) Any individual who, without payment and without expectation of any gain, directly or indirectly, volunteers to engage in the activities of an educational, charitable, religious, or nonprofit organization;

(B) Any lay member elected or appointed to office within the discipline of any religious organization and engaged in religious functions; ~~or~~

(C) Any individual employed as a casual babysitter, in or about the residence of the employer; ~~or~~

(D) Medical specialists.

(3) “Employer” means an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer, but does not mean the District of Columbia government or the United States government.

_____(4) (4) “Medical specialist” means an individual who performs work
in the District of Columbia on behalf of an employer engaged primarily in the delivery of
medical services and who:

_____(A) Holds a license to practice medicine;

_____(B) Is a physician;

_____(C) Has completed a medical residency; and

_____(D) Has total compensation of at least \$250,000 per year.

_____(5) “Non-compete provision” means a provision of a written agreement between
an employer and an employee that prohibits the employee from being simultaneously or
subsequently employed by another person, performing work or providing services for pay for
another person, or operating the employee’s own business. The term “non-compete provision”
does not include:

(A) An otherwise lawful provision that restricts the employee from
disclosing the employer’s confidential, proprietary, or sensitive information, client list, customer
list, or a trade secret, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of
1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)); or

(B) An otherwise lawful provision contained within or executed
contemporaneously with an agreement between the seller of a business and one or more buyers
of that business wherein the seller agrees not to compete with the buyer’s business.

(5) “Retaliate” means to take an adverse action, including a threat, verbal
warning, written warning, reduction of work hours, suspension, or termination against one or
more employees- or medical specialists.

(6) “Workplace policy” means the rules and restrictions, whether written or as a matter of practice, implemented by an employer to govern the conduct of the employer’s employees.

Sec. 102. Non-compete rights and restrictions.

(a) No employer may require or request that an employee sign an agreement that includes a non-compete provision.

(b) A non-compete provision contained in an agreement that was entered into on or after the applicability date of this title between an employee and an employer shall be void as a matter of law and unenforceable.

(c) No employer may have a workplace policy that prohibits an employee from:

(1) Being employed by another person;

(2) Performing work or providing services for pay for another person; or

(3) Operating the employee’s own business.

(d) No employer may retaliate or threaten to retaliate against an employee for:

(1) The employee’s refusal to agree to a non-compete provision;

(2) The employee’s alleged failure to comply with a non-compete provision or a workplace policy made unlawful by this title;

(3) Asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited under this title to any of the following:

(A) An employer, including the employee’s employer;

(B) A coworker;

(C) The employee’s lawyer or agent; or

(D) A governmental entity; or

(4) Requesting from the employer the information required to be provided to the employee pursuant to subsection (e) of this section.

(e)(1) An employer shall provide an employee who works for the employer with the text of paragraph (2) of this subsection in writing, no later than:

(A) Ninety calendar days after the applicability date of this title;

(B) Seven calendar days after an individual becomes an employee of the employer; and

(C) Fourteen calendar days after the employer receives a written request for such statement from the employee.

(2) “No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.”.

Sec. 103. Protections for medical specialists.

(a) An employer that seeks to have a medical specialist execute a non-compete provision as a condition of employment shall provide:

(1) The proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision; and

(2) The following written notice to the medical specialist at the same time the employer provides the proposed non-compete provision to the medical specialist: “The Ban on Non-Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as “covenants not to compete”) from medical specialists they plan to employ. The prospective employer must provide

the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least \$250,000 per year.”

(b) No employer may retaliate or threaten to retaliate against a medical specialist for:
(1) Asking, informing, or complaining about conduct required or prohibited under this section to:

(A) An employer, including the medical specialist’s employer;

(B) A coworker;

(C) The medical specialist’s lawyer or agent; or

(D) A governmental entity; or

(2) Requesting from the employer the information required to be provided to the medical specialist pursuant to subsection (a) of this section.

Sec. 104. Relief and penalties.

(a)(1) The Mayor and Attorney General shall administer and enforce this title consistent with their respective powers and rights under section 6(a)-(c) of An Act, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1306(a)-(c)).

(2)(A) Any records an employer maintains pursuant to the requirements of regulations issued to implement this title shall be open and made available for inspection or transcription by the Mayor, the Mayor’s authorized representative, or the Office of the Attorney General upon demand at any reasonable time. An employer shall furnish to the Mayor, the Mayor's authorized representative, or the Office of the Attorney General on demand a sworn

statement of records and information upon forms prescribed or approved by the Mayor or Attorney General.

(B) No employer may be found to be in violation of subparagraph (A) of this paragraph unless the employer had an opportunity to challenge the Mayor or Attorney General's demand before a judge, including an administrative law judge.

(b)(1) The Mayor may assess an administrative penalty of no less than \$350 and no more than \$1,000 for each violation of this title; except, that each violation of section 102(d) and 103(b) assessed against an employer shall be for not less than \$1,000.

(2) The Mayor may not collect an administrative penalty under this subsection unless the Mayor has provided the employer alleged to have violated this title notification of the violation, notification of the amount of the administrative penalty to be imposed, and an opportunity to request a formal hearing held pursuant to the Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Official Code § 2-501 *et seq.*), and section 8a(e) of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)).

(c)(1) A person aggrieved by a violation of this title may pursue relief by filing:

(A) An administrative complaint with the Mayor setting forth facts minimally sufficient to allege a violation of this title; or

(B) A civil action in a court of competent jurisdiction. In such action, a plaintiff shall carry the burden of proof by a preponderance of evidence.

(2)(A)(i) The procedures set forth in section 8a(c),(d),(e)-(m) of An Act, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(c),(d),(e)-(m)), shall govern the conciliation, resolution, and enforcement of an administrative complaint filed pursuant to paragraph (1)(A) of this subsection; provided, that section 8a(e)(4)-(5) of An Act,

effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1308.01(e)(4)-(5)), shall not apply.

(ii) Appeals of any administrative order issued under this title shall be made to the District of Columbia Court of Appeals.

(B) Section 8 of An Act, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1308), shall apply to any civil action filed pursuant to paragraph (1)(B) of this subsection.

(d) Upon investigation by the Mayor pursuant to subsection (a) of this section or in an action to enforce this title pursuant to subsection (c) of this section, an employer found to have violated section 102 or 103 shall be liable for relief payable to an employee or medical specialist as follows:

(1)(A) An employer that violates section 102(a), (c), or (e), or section 103(a) shall be liable for each violation to each employee or medical specialist subjected to the violation for monetary relief in an amount not less than \$500 and not greater than \$1,000.

(B) For any subsequent violation of section 102(a), (c), or (e), or section 103(a) an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee or medical specialist.

(2)(A) An employer that attempts to enforce a non-compete provision that is unenforceable or void as provided in section 102(b) shall be liable to each employee against whom the employer attempted to enforce the non-compete provision for relief in an amount not less than \$1,500.

(B) For any subsequent violation of section 102(b), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee.

(3)(A) An employer that retaliates against an employee in violation of section 102(d) or section 103(b) shall be liable for each instance of retaliation to each employee or medical specialist subject to the retaliation in an amount not less than \$1,000 and not more than \$2,500.

(B) For any subsequent violation of section 102(d) or 103(b), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than \$3,000 to each affected employee or medical specialist.

Sec. 104. Rules.

The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules to implement the provisions of this title, including rules requiring employers to keep, preserve, and retain records related to compliance with this title.

TITLE II. BAN ON NON-COMPETE AGREEMENTS; WAGE THEFT PREVENTION FUND

Sec. 201. Section 7a of An Act To provide for the payment and collection of wages in the District of Columbia, effective February 26, 2015 (D.C. Law 20-157; D.C. Official Code § 32-1307.01), is amended as follows:

(a) Subsection (b) is amended by striking the phrase “section 7” and inserting the phrase “section 7 and section ~~103~~104(a)-(b) of the Ban on Non-Compete Agreements Amendment Act

of 2020, as approved by the Committee on Labor and Workforce Development on November 19, 2020 (Committee Print of Bill 23-494) (“Ban on Non-Compete Agreements Act”)” in its place.

(b) Subsection (c) is amended by striking the phrase “this act, the Minimum Wage Revision Act, the Sick and Safe Leave Act, and the Living Wage Act” and inserting the phrase “this act, title I of the Ban on Non-Compete Agreements Act, the Living Wage Act, the Minimum Wage Revision Act, and the Sick and Safe Leave Act” in its place.

TITLE III. REPEALER; APPLICABILITY; FISCAL IMPACT STATEMENT;
EFFECTIVE DATE

Sec. 301. The Broadcast Industry Contracting Freedom Act of 2002, effective March 27, 2004 (D.C. Law 14-258; D.C. Official Code § 32-571 *et seq.*) is repealed.

Sec. 302. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec. 303. Fiscal impact statement.

250 The Council adopts the fiscal impact statement in the committee report as the fiscal
251 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
252 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

253 Sec. 304. Effective date.

254 This act shall take effect following approval by the Mayor (or in the event of veto by the
255 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
256 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
257 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
258 Columbia Register.

259